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# GROUNDWORK FOR A THEORY OF THE COMBATANT

by

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## **Biography**

Lt Col Paul Vicars is assigned to the Air War College, Air University, Maxwell AFB, AL. He was commissioned in 1999 at AFROTC Detachment 157, Embry-Riddle University, Daytona Beach, Florida. He has flown the F-16 in South Korea, as a Forward Air Controller-Airborne in Alaska, as well as in support of Operation Noble Eagle in Guam. He has also served in the Joint Operations Center, Combined Forces Command, Kabul, Afghanistan. He has joint service on staff at U.S. Pacific Command, as well as joint education at Fort Leavenworth, Kansas. Most recently, he served as Commander, 25th Flying Training Squadron, Vance AFB, Oklahoma, where he was responsible for conducting phase III of Specialized Undergraduate Pilot Training in the T-38 Talon, graduating approximately 100 students per year.



## **Abstract**

Individualistic approaches to killing in war such as self-defense and liability are among the most common ways contemporary scholars understand killing in war. However, such arguments can be very complex, which makes them of little practical value in actual moral deliberation. Additionally, the reductive nature of these arguments limits their application to actual wartime scenarios. A more promising approach is the collectivist, because it better captures the nature of the various morally relevant relationships involved. Those relationships are between the combatant and self, society, purpose, comrade, environment, and enemy. However, no attempts have yet been made to fully analyze these relationships and synthesize them in a way that captures the fullness of the combatant's moral reality. Such a synthesis would be a theory of the combatant. This paper highlights the deficiencies of current research and proposes the groundwork for a broader study of the morality of killing in war.

## Introduction

The U.S. Government recently released a redacted version of its plan for approving lethal attacks on suspected terrorists.<sup>1</sup> This information has been long requested by interested parties who are concerned about human rights violations and the dangers of targeted assassinations as a strategy.<sup>2</sup> Because such attacks are commonly executed by drones, this debate highlights two aspects of U.S. policy that warrant some detailed analysis. The first aspect that warrants analysis is the strategy of targeted assassinations. Is the justification for such killings based on criminal law or the laws of war? The Presidential Policy Memo released by the US Department of Justice details the process by which such decisions are made, but does not discuss the criteria used to justify such killings. The second aspect that warrants analysis is the morality of killing with drones. If killing in war is justified based on the logic of self-defense or the mutual imposition of risk, as will be discussed below, then drones cross a line in which killing may no longer be justified. Thus, when considering drones, perhaps even in war, neither self-defense nor mutual imposition of risk apply. To understand what such changes portend for killing in war, we must understand how killing is currently justified. The answer, as I'll argue below, isn't as clear as one might expect.

The just war tradition has long provided the language with which we discuss the justice of war as well as justice in war. Its influence over the centuries has been so great, that it was even used as the foundation of contemporary international law. Scholars, over the past few decades, have tried to detail how states justify killing in war beyond the language of just war. Their efforts have resulted in widely varying approaches. I will survey those efforts, as well as the more traditional approaches to determine which form of justification best accounts for the moral reality of states and combatants when presented with decisions relating to war. I conclude

that contemporary attempts to justify killing in war are either wrong or incomplete and what is needed is broader understanding of the moral context of combatants before attempting a detailed justification of killing in war.

The argument begins with a review of common efforts to justify killing in war that appeal to individual morality—self-defense and liability. These forms of justification can be complex and involve detailed and rigorous argumentation. The next form of justification is the collective form. These arguments usually consider more of the complexities of war and warfare than individualist approaches, but are generally less detailed and rigorous. In the subsequent section, I will argue that individualist approaches are inadequate to capture all the factors that explain the moral reality of the combatant. I also argue that recent collectivist arguments better capture the moral reality of the combatant, but need to be developed more deeply. The final section looks at the elements necessary to understand the combatant's moral reality by briefly introducing the moral relevance of the combatant's relationship to self, society, purpose, comrade, environment and enemy. These elements are acknowledged by some, but are inadequately explored, and they are ignored by others. The argument below details these inadequacies and argues for what should frame a broader theory of the combatant.

## On Killing in War

In surveying the literature on killing in war, one finds that commentators bring one of two presuppositions to the discussion which completely frames the nature of their arguments. They believe either that war is *sui generis* and that killing in war is different than killing in other contexts.<sup>3</sup> Conversely, others believe that war presents no special circumstances that would require justification beyond what is available in normal everyday life. The first, those who accept war as a separate reality, generally use what is called a collectivist approach to killing in war.<sup>4</sup> The latter use individualist approaches. Each position is described and evaluated below.

### Individualist Approaches

Individualist approaches take one of two forms. In the first, justification for killing in war is inferred from theories of individual *self-defense*. The second requires separate assessments of each individual to determine their *liability* to killing in war. I describe each to include their weaknesses below.

#### *Self-Defense*

The idea of killing in self-defense isn't as simple as it might seem. Indeed, it is possible to distinguish between multiple types of threats and various responses to each. Judith Jarvis Thomson's 1991 article titled simply, "Self-Defense" is often the starting place from which later scholars deviate. In her article, she lists three examples where killing in self-defense is permissible—she titled these Villainous-Aggressor, Innocent-Aggressor, and Innocent-Threat. She also lists three cases where killing in self-defense is not permissible—these she titled Substitution-of-a-Bystander, Use-of-a-Bystander, and Riding-Roughshod-over-a-Bystander.<sup>5</sup> I will briefly describe the moral significance of each of these cases, then summarize and

differentiate some of the varied approaches to show the weaknesses of the self-defense argument when used to justify killing in war.

First, consider the cases where Thomson argues it is permissible to kill in self-defense. In her example titled Villainous-Aggressor, imagine you are being attacked by someone who has the intent of taking your life and is *responsible for that intent*. This is opposed to Innocent-Attacker where you are being attacked by someone with intent to kill you, but the attacker, in this case, is *not responsible for that intent*. Think of someone who is mentally ill and cannot discern the moral importance of his actions. Finally, in Innocent-Threat, imagine you are lounging poolside next a tall building, and a villain bent on killing you has shoved a person off the roof such that he will land on you and kill you, but will survive because he landed on you. In this case the falling person *poses a threat to your life, but lacks intent*. Thus, he cannot be responsible for posing the threat. In all three of these cases, Thomson argues you would be justified in killing in self-defense.

These cases are contrasted with Thomson's other cases where she argues that killing in self-defense is not permitted. The decisive factor in the cases that follow is that they all involve a bystander. Thomson contends that you cannot deflect a threat if it will kill a bystander in Substitution-of-a-Bystander. Additionally, she argues in Use-of-a-Bystander that it is impermissible to use a bystander as a means of defense. And finally, as the name suggests, it is impermissible to "run roughshod" over, and kill a bystander while fleeing a threat in Riding-Roughshod-over-a-Bystander.

All six of the above cases have been discussed and debated with various outcomes over the few decades. Thomson is generally among the most permissive, in that her theory of self-defense restricts the use of lethal force in relatively few cases. She grounds her argument in the



victim's right not to be killed. She argues that, in the first three cases, it is permissible to kill in self-defense, because (1) you have a right not to be killed, (2) that by killing you, your right will be violated, and (3) if you do not kill, you will be killed.<sup>6</sup> Even in the case of the Innocent-Threat, the lack of intent or active responsibility does not obviate any of these three permitting factors. Therefore, you are permitted to deflect the falling man to his certain demise. Using Thomson's rights-based justification, you are permitted to defend yourself with lethal force against a Villainous Aggressor, an Innocent Aggressor, as well as an Innocent Threat. These are the cases from which most commentators begin, and deviate. What follows are some other perspectives.

Yitzhak Benbaji accepts Thomson's rights-based permission to kill in self-defense, and argues further that the falling man in Innocent-Threat, using the same logic that permits you to kill him (he will be violating your right not to be killed), has a right of reciprocal self-defense against you.<sup>7</sup> Thus, it is permissible both, for you to kill the falling man, and for him to actively kill you, because of your intent to kill him (and violate his right not to be killed). While all this permissible killing may sound strange, Benbaji uses this scenario to justify the traditional war convention.<sup>8</sup> He argues that combatants on both sides of the war retain their right to self-defense, and this explains why they are permitted to kill each other without guilt in international law. But, unlike Benbaji, not everyone accepts Thomson's rights-based approach.

On the opposite end of the spectrum, Michael Otsuka presents a much more restricted view of killing in self-defense. He argues that even though the falling man will kill you, you do not have the right to self-defense, because he does not act as a "responsible agent."<sup>9</sup> Otsuka argues that, "It is natural to think that one bears special moral responsibility for such killings that flow from one's agency. No such special responsibility, however, plausibly attaches to lethal

movements of one's body over which one has no control.”<sup>10</sup> In essence, since the falling man has no control over his movement, his killing you is not an act of agency, and therefore, it is impermissible to kill him. In this way, Otsuka argues, both the Innocent Threat and the Innocent Aggressor are “morally on par” with a bystander.<sup>11</sup> Using Otsuka’s logic, self-defense as a justification for killing in war would be greatly limiting, and would require additional information as to the responsibility of the agent, before action could be taken.

I’ve only summarized three arguments, and while there are many others with greater nuances, these three serve specific illustrative purposes.<sup>12</sup> Thomson authored the position that has shaped the debate since 1991 and represents the permissive, or broad, view of self-defense. Otsuka represents how one can view the same scenarios, account for different moral factors and arrive at a more restrictive, or narrow, view point. Thus, Thomson and Otsuka demonstrate how widely views can vary when considering self-defense as a justification for killing in war. Finally, Benbaji clearly correlates the logic of killing in self-defense to the logic of the war convention. This step is completely necessary if self-defense is, in fact, how combatants are justified in killing during war. So, how viable is self-defense as a justification for killing in war?

The great attraction of self-defense as a justification, paradoxically given the complexity noted above, is its reductive simplicity—a single concept for all of war. Its reductive property is also the source of its primary weakness—application. Our intuition about self-defense commonly involves Thomson’s Violent-Aggressor—an agent with intent and responsibility—but the category in which we must understand combatants is the Innocent-Threat—an agent with neither intent nor responsibility. We must understand combatants in this way because, simply being a combatant does not necessarily involve active aggression—many combatants have non-combat jobs and lack the responsibility of killing. These combatants lack both intent and responsibility,

which would equate them to Innocent Threats rather than Violent Aggressors. Additionally, the Innocent Attacker case, where the attacker has intent but is not responsible for the intent, does not apply because we commonly believe it is permissible to kill combatants as a class or group, regardless of their intent or responsibility. As Paul Kahn contends, “Neither has wronged the other, or anyone else. But each is licensed, legally and morally, to try to injure or kill the other.”<sup>13</sup> Because of this, combatant justification for killing in war must come from the case of the Innocent Threat, which may or may not be an option depending on whether one adopts Thomson’s rights-based view, or Otsuka’s moral-responsibility view. Also, it is a great stretch to equate all combatants, many of whom have full utility of personal agency to act and attack, with a falling man whose agency is not a factor in the threat he poses. These two points give us reason to also doubt the applicability of self-defense as a justification for combatants to kill in war. Since none of the three primary cases of permissible killing in self-defense can be applied broadly, then we must look elsewhere for justification. Thus, we turn to the second individualist approach, based on liability, proposed by Jeff McMahan.

### *Liability*

McMahan has proposed a revisionist approach that challenges normal intuition about killing in war.<sup>14</sup> His model is individualist in nature, in that it is based on an individual’s *liability* to be attacked, rather than simply his/her role as a combatant. Because of its novelty, his work has become the center of the debate in recent years.<sup>15</sup> He contends, based on a strict assessment of just cause, that combatants do not have equal permission to kill one another in war. Rather he argues that, in general, only the combatants on the just side have permission to kill.<sup>16</sup> This is because just combatants do not lose their right to not be killed merely by fighting in a just war; whereas, combatants on the unjust side of the war are liable to be killed because they are wrong

for fighting for an unjust cause. In short, he argues for moral *asymmetry* between combatants, where those on the just side are permitted to kill, while those on the unjust side are not.

McMahan believes that if this moral asymmetry was commonly accepted, then combatants would consider their decision to fight more deeply, because they would be reluctant to fight in an unjust war.<sup>17</sup> McMahan concedes, “My argument that the moral risks involved in participation in war may exceed those of nonparticipation exerts pressure in the direction of a contingent form of pacifism.”<sup>18</sup> However, this is part of his goal—to prevent war by holding combatants accountable for the decision to go to war, thus increasing the moral stakes for being wrong.<sup>19</sup> McMahan differs also, as eluded to above, in that his purposes aren’t necessarily descriptive of our current understanding of killing in war, rather they are prescriptive of how we ought to think about killing in war. So the question becomes, is his approach viable?

Many have critiqued McMahan’s approach, usually for its consequences rather than its logic or priorities. For instance, many have offered that a logical consequence of McMahan’s reasoning is that soldiers who are clearly losing will not surrender for fear of criminal prosecution by their enemy. McMahan even acknowledges that the fear of punishment will have “various bad effects on the conduct of war.”<sup>20</sup> But I argue that McMahan’s proposal faces even more fundamental challenges, because it requires an unlikely degree of objectivity, as well as impractical knowledge of moral responsibility.

McMahan’s reasoning is like Otsuka’s in that McMahan also contends that merely posing a threat is insufficient to warrant liability to attack.<sup>21</sup> McMahan argues that “the criterion of liability to attack in war is *moral responsibility* for an *objectively* unjustified threat of harm” (emphasis mine).<sup>22</sup> His reasoning on both moral responsibility and objectivity provide warrant for rejecting his model. First, considering moral responsibility, reasoning about the liability of an

agent is fundamentally an act of discrimination. Normally, combatants must discriminate between enemy combatants and non-combatants. However, McMahan's reasoning requires the ability to discern the "moral responsibility" of the enemy (both combatants and non-combatants) to determine a proportional level of force to apply.<sup>23</sup> The immediate response is that such detailed discrimination is impossible in warfare. McMahan retorts, "This is largely true. But...reasonable agents in war have to act on the basis of presumptions that are as well grounded as possible in the circumstances."<sup>24</sup> He gives the example of U.S. forces in the Gulf War. He says that it is "reasonable to assume that the members of the Iraqi Republican Guard, a highly paid, elite volunteer force loyal to the regime, were responsible for their action to a higher degree than poorly armed conscripts who had been compelled by threat to themselves and their families to take up positions in the desert."<sup>25</sup> With this presumption, U.S. troops ought to use proportionally less force on the conscripts than the Republican Guard. Michael Walzer, addressing this specific example, proposes a scenario that involves Iraqi conscripts protecting the flank of the Republican Guard. He asks, "How would McMahan explain to the American soldiers that they have to use minimal force and accept greater risks over there, even while they are fighting as harshly as is 'necessary' over here? I would like to listen to his talk to the soldiers."<sup>26</sup> Beyond the practical challenges, McMahan must answer to the fact that he permits presumption when choosing to kill, a morally significant act, but demands objectivity and certainty in the decision to fight, an act of significantly less moral importance. This required objectivity is also problematic.

For McMahan, the source for objective justification is not the combatant's government, because governments have incentive to mislead their combatants to get them to fight. Rather, McMahan proposes that an international organization with the authority to adjudicate the justice

of war should be established. This organization would provide an objective source to determine the just and unjust sides of a war.<sup>27</sup> This is problematic for at least three reasons. First, it would require combatants to have greater loyalty to the international authority than to their own government. Second, there is no certainty that the ruling of such an organization would be unbiased enough to warrant moral superiority. And finally, it is unlikely that such an organization would be able to adjudicate matters to the detailed degree required by McMahan. Ultimately, he acknowledges that problems exist with such a proposal and concedes “The moral status of an individual combatant might have to be relativized to particular roles, or particular missions, rather than the justice of his or her sides’ war as a whole.”<sup>28</sup> This admission undermines his argument in that he admits objectivity is likely to be unattainable, and thus advocates for a different form of collectivism.<sup>29</sup> This is not a surprising revelation for the combatant because objectivity in decisions relating to war, both in deciding whether to fight as well as whom to kill, is a great challenge, because of the sacrifice required to serve and fight. In short, it is unreasonable to demand objectivity of someone who has the highest degree of skin in the game.

The individualist approaches to justifying killing in war have been presented in two forms—self-defense and liability. Self-defense is inadequate because it is too narrow of a concept to capture the fullness of the moral status, roles, responsibilities, and decisions of the combatant. The liability approach, proposed by McMahan, is unreasonable in that it demands an unlikely degree of objectivity and an impractical assessment of moral responsibility. This is not to say that such individualist inquiries are not helpful or even necessary, but they are inadequate to explain the fullness of moral decision making of combatants in war. But there is another

approach that better captures the social dynamics of being a combatant and permits killing without such deliberate assessment of individual moral responsibility.

### **Collectivist Approaches**

To adhere to a collectivist approach, in the sense relevant here, is to partition off a select group based on some criteria and attribute to that collective some form of moral distinction—impose a duty on them; judge them; condemn them; give them special rights etc. International Humanitarian Law (IHL) uses a collectivist approach, and roughly represents the way most people think about killing in war. Combatants, as a sanctioned class of citizenry, bear the physical risk of dying, and the moral risk of killing on behalf of, and at the behest of, the nation they serve. While executing this role, they are collectivized, given special permission to kill other combatants, and are judged by a separate moral code known as *jus in bello* in the just war tradition. This separate moral sphere requires them, while in prosecution of war, to distinguish between combatants and non-combatants when killing, and ensure the violence used is proportional to the military objective desired. If they adhere to these principles, they are considered “not guilty” regardless of the injustice of their war. This symmetry among combatants is what McMahan argues against, and has come to be regarded as the property of collectivism that requires special defense. Below are three defenses of the collectivism of IHL from Michael Walzer, Noam Zohar, and Christopher Kutz. Each defend collectivism in subtly different ways. I argue that collectivism is more appropriate than individualism because it better explains the full moral reality of combatants. However, there are additional morally relevant factors involving combatants that are generally unexplored in the collectivist camp. Commonly, defenders of the just war tradition defend the whole system, without highlighting the collective assumptions. The most influential person in recent times to do so was Michael Walzer.

Walzer published a highly influential explanation of the war convention titled *Just and Unjust Wars*. His method was not necessarily to justify the war convention, but to explain it with historical example. While this method leaves much to be desired, it creates a compelling narrative.<sup>30</sup> This is evident in his explanation of the moral equality of soldiers,

It is the sense that the enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself. Armed, he is an enemy; but he isn't my enemy in any specific sense; the war itself isn't a relation between persons but between political entities and their human instruments. These human instruments are not comrades-in-arms in the old style, members of the fellowship of warriors; they are "poor sods, just like me," trapped in a war they didn't make. I find in them my moral equals. That is not to say simply that I acknowledge their humanity, for it is not the recognition of fellow men that explains the rules of war; criminals are men too. It is precisely the recognition of men who are not criminals.<sup>31</sup>

This narrative, while lacking rigor, tells the story from the perspective of the combatant and emphasizes the personal nature of the relationship. It isn't between criminals, nor one of complete enmity or hatred (although those emotions may frequently be present). Rather, it is a relationship between individuals who recognize their mutual role as the means of political will.

Walzer, by describing the combatant perspective in the first person, shows that the relationship between enemy combatants can have greater complexity than falling men or armed psychopaths. Thus, he shows that the combatant's moral perspective is a necessary element in understanding and explaining killing in war. In this way, Walzer's historical approach is laudable because it references the actual moral decision-makers in their context, rather than academically rigorous but largely non-applicable similes. The weaknesses of Walzer's method open many questions, and leave him vulnerable to refutation from many directions. And ultimately he misses what is needed most—a rigorous *defense* of collectivism. For this, we turn first to Noam Zohar.

Zohar argues that individual self-defense is inadequate to justify the war convention.<sup>32</sup> He briefly explores various perspectives of social science and concludes that individuals and



collectives “simply coexist.”<sup>33</sup> Thus, he continues, “If our moral thinking is to relate to the real world it cannot but share this dual perspective.”<sup>34</sup> Recognition of this, he believes, is what shapes the “moral compromise” of the war ethic.<sup>35</sup> “It guides us to regard some members of the enemy society solely as individuals while subsuming others under their collective identity as ‘the enemy people.’ The key factor is participation: combatants are those marked as participating in the collective war effort, whereas the rest of the enemy society retain their exclusive status as individuals.”<sup>36</sup> Zohar’s conclusion is particularly appealing in that it provides a reason for the moral distinction between individuals and collectives, and a basis we can use for recognizing the difference—participation. However, what Zohar doesn’t attempt to explore is the symmetry of the permission to kill that we attribute to combatants on both sides. For this we turn to Christopher Kutz.

Kutz develops an argument that attributes combatant privilege not only to uniformed military members, but also to non-uniformed insurgents who fight against their own state.<sup>37</sup> He does this in order to justify the changes to the war convention in 1977.<sup>38</sup> In doing so, he provides an argument for collectivism, that grounds the combatant’s privilege in that, “only political groups engaged in violence in support of political goals, in the sense of aiming at creating (or restoring) a new collective ordering, can rightly claim the privilege. Whether a group’s violent acts count as political, or as merely criminal, turn principally on three factors: the existence (or not) of an internal ordering, the character of its aims, and the degree of success on the ground.”<sup>39</sup>

Kutz’ argument is important because he shows the importance of the relationship of combatants, individual and collective, to the state. This relationship has great moral relevance to because it provides both identity and duty, as well as warrant for action in war. One can certainly argue, as I would be inclined to do, against Kutz’s notion that political goals *aimed at collective*

*ordering* are the basis for combatant privilege, he rightly grounds the privilege in the political. Importantly, according to Kutz, combatant privilege is independent of the justice of the war, thus providing a basis for equality both morally and in IHL. But Kutz leaves unaddressed some morally relevant relationships explained below.

Having explored the strengths and weaknesses of various arguments for both self-defense and collectivism, it is clear that collectivism provides a stronger basis for understanding the full moral reality of the combatant. However, there is more that is necessary to examine.

### **Groundwork for a Theory of the Combatant**

Theories of self-defense, while providing sound reasoning, have the challenge of making that reasoning relevant to the case of the combatant. A challenge that I believe is insurmountable given the reductive nature of such arguments. While collectivism provides a better basis for an exploration of the combatant, the arguments available are generally incomplete. Walzer replaces argumentative rigor with historical anecdote, but focuses appropriately on the combatant's moral reasoning. Zohar provides a sound basis for morally distinguishing between individuals and collectives, but doesn't fully address why combatants on the unjust side of the war are judged equally as those who serve the just. Finally, Kutz provides a great argument for collectivism by detailing the nature of the relationship between the combatant and the sovereign, but leaves unaddressed some of the other morally relevant aspects of being a combatant examined below.

To best understand killing in war, one must synthesize the combatant and all his/her relationships of moral relevance. From here on, I assume a collective perspective of the combatant, though I may refer to combatants as individuals. Also, I do not necessarily seek to *justify* killing in war, as individualists do, rather simply to explain the morally relevant relationships that account for our current understanding.<sup>40</sup> These relationships include the

combatant to self, society, purpose, comrade, environment and enemy. A full analysis and synthesis is beyond the scope of this paper, so what follows is an explanation of why each of these relationships is morally relevant to an accurate understanding of the combatant, and proposes a direction for expanded research.

*Relation to Self: Military Virtues and Professionalism*

St. Ambrose, when discussing fortitude in war, says, “The glory of fortitude, therefore, does not rest only on the strength of one’s body or of one’s arms, but rather on the courage of the mind. Nor is the law of courage exercised in causing, but in driving away all harm. He who does not keep harm off a friend, if he can, is as much in fault as he who causes it.”<sup>41</sup> St. Ambrose highlights that to be strong in war requires physical strength as well as mental courage that is focused on protecting “friends.” An argument can be made that those combatants and militaries that judge themselves by virtues such as these may be entrusted with the responsibility to kill on behalf of the state. Similarly, there would be reason to doubt the justice of those combatants and militaries that do not judge themselves by such standards. This is because the virtue and professionalism of combatants can have great influence on moral reasoning and intent. A broader study of a combatant’s relationship to self would involve a more in depth analysis of the military virtues and the professionalism of the collective, to provide broader insight into the influence these have on moral reasoning in war. This is the moral relevance of a combatant’s individual and collective self-understanding—the combatant’s relationship to self. Of course, virtues and professionalism are not just self-imposed. They may be required by the second morally-relevant relationship—society.

*Relation to Society: Source of Being, Duty, and Purpose*

As the St. Ambrose quote above mentions, those with the means to protect have a duty to do so. This should be the basis of the combatant's relationship to society. Such a relationship was novel after the Thirty Years War. Stephen Neff states in his history of the laws of war, "The new prominence of nation-states on the European scene was abundantly apparent in the area of war. Its most obvious manifestation was the establishment of standing armies as instrument of the over-all national interest, in place of the feudal levies and ad hoc calls to arms of the general population that had characterized medieval warfare."<sup>42</sup> This separation of a military service from the civilian populace at large gives meaning to the idea that the military can have a relationship with the society that formed it. Generally, military forces that are formed by societies, and that serve at their behest, have a foundation for legitimate use in war. Non-state organizations do not. This implies that the justification for killing in war would be for the purposes of the state, not individual self-defense. A broader study of this aspect of the combatant would involve research in political theory and just war theory, to determine what morally relevant factors in the combatant's relationship to society that permit killing in war. It is enough to show here that many of the combatant's rights and duties come from their relationship to their society; and that society is the source of the combatant's being, duty, and purpose. These are morally relevant factors that must be accounted for when judging combatants.

*Relation to Purpose: More than Just Cause*

One of the problems with McMahan's system is that he only judges combatants by one factor—the justice of their cause, or in other words, the purpose of their war. Yet, this is only one of many morally-relevant purposes that shape what it means to be a combatant. Nearly all aspects of military being and action involve purpose. There is a purpose for dress, training,

organization, movement, as well as the litany of excruciating and explicit detail that defines much of the daily routine. Every military unit has a mission, which is its purpose. Not all of these purposes are morally relevant, but many of them are. Christopher Kutz discusses the moral purposes of uniforms.<sup>43</sup> The *jus in bello* principle of proportionality involves an assessment of purpose. Many militaries around the world are used for purposes that involve violence, while their nations are not technically at war. A broader study of purpose would involve determining to what extent the purposeful elements that shape the being and actions of combatants, bear on their moral decision making. Those that study combat motivation largely agree that one of the primary motives for combatants in combat is their relationship with comrades, which is our next topic.

#### *Relation to Comrades: Motivation for Battle*

While I argue that the logic of self-defense is inadequate to justify all killing in war, it would be disingenuous to suggest that self-defense is not a factor in combat. It is. However, it does not involve the individualist logic proposed above. Chris Hamner, in his study of combat motivation, argues that the common desire to survive has manifested itself, necessarily, in trust for comrades, because “the individual soldier’s own survival depended upon that crucial support from his fellows.”<sup>44</sup> This is because individual weakness is collective weakness. Sebastian Junger, while embedded with a unit serving in one of the deadliest areas of Afghanistan notes, “Whether you tied your shoes or cleaned your weapon or drank enough water or secured your night vision gear were all matters of public concern and so were open to public scrutiny. ... There was no such thing as personal safety out there; what happened to you happened to everyone.”<sup>45</sup> These pressures are of great moral relevance to killing in war. A broader study of this aspect would include determining what other factors of relationship to comrade bear on

killing in war. However, for the combatant, what makes the relationship to comrade so important, is that it is essential for survival in the chaotic environment of war.

*Relation to Environment: Friction, Risk and Lawlessness*

Probably the most significant factor that must be considered when judging a combatant during war is the environment. As mentioned above, it is commonly assumed by those who adopt individualist approaches, that war is not *sui generis*. Conversely, it is assumed by those who adopt a collectivist approach that it is unique, however little effort is put toward defending this presupposition. Such a defense is necessary, and I propose a brief argument for the uniqueness of the environment.

War's environment is defined by friction, risk, and lawlessness. The moral relevance of these factors cannot be discounted. Karl von Clausewitz, an early-nineteenth-century Prussian military theorist, originally proposed the idea of friction, stating "The dangers inseparable from war and the physical exertions war demands can aggravate the problem to such an extent that they must be ranked among [friction's] principal causes."<sup>46</sup> Because friction permeates all of war, from the strategic to the tactical level, the success of any plan or action is largely up to chance. Chance involves risk. There is little to no discussion of the ethics of risk in the literature about killing in war. Sven Hansson noticed this same deficiency in the larger study of ethics. He states, "In order for moral philosophy to deal adequately with the actual moral problems that we face in our lives, it has to treat risk and uncertainty as objects (or aspects) of direct moral appraisal. This will have the effect of complicating moral analysis, but these are complications stemming from its very subject-matter and are avoidable only at the price of increased distance from actual moral life."<sup>47</sup> There is an ethics of risk, and it is morally relevant to the combatant. Finally, war in execution is lawless. In civil society, there is a supervening authority, commonly

recognized by those that comprise the society, that enforces the laws that bound societal relationships. There is no such authority in war. The social space between enemy combatants is lawless—there is no supervening authority, commonly recognized by both sides that will enforce any perceived rules. The rules, to include international law, are always self-imposed. Combatants on either side, therefore, are primarily accountable to their comrades, leaders, and societies for their behavior in war. Recognizing this natural asymmetry is the primary reason for the imposition of symmetry (i.e. the moral equality of combatants) in international law.<sup>48</sup> If all parties to war abide by international law, it will serve as a catalyst for decreasing the overall violence of war. A broader study of the environment would seek to better understand how friction, risk, and lawlessness effect the moral being and decisions of combatants in war. Choosing to abide by the rules the combatant's nation requires, is clearly morally relevant and friction, risk, and lawlessness influence such decisions.

*Relation to Enemy: Cause and Equality*

The greatest risk to combatants, of course, is the enemy. Which is the final morally relevant relationship to consider. It is in this relationship that all of the other morally relevant factors listed above have meaning. The combatant's relationship to self, society, purpose, comrade, and environment come to bear as the combatant engages the enemy. The hostilities that exist in this relationship are based on the mutual disagreement between the governments, and are fueled by the enmity between the societies.<sup>49</sup> While McMahan believes that combatants should view their enemies based on the justice of their cause, the more important element for the combatant is whether their societies obligate them to appropriate forms of restraint—virtue, professionalism, and international law. These have greater influence on the actual fighting than the justice of the cause, and thus have greater moral relevance to the battlefield. Therefore, it is

in the decisions and actions that a combatant takes in relation to his enemy, that all of the other morally relevant factors are synthesized and decisions to kill are made. Each of these factors must be considered if we want to fully assess the morality of combatants killing in war.





## Conclusion

Individualistic approaches to killing in war such as self-defense and liability are among the most common ways contemporary scholars understand killing in war. However, such arguments can be very complex, which makes them of little practical value in actual moral deliberation. Additionally, the reductive nature of these arguments limits their application to actual wartime scenarios. A more promising approach involves collectivism because it better captures the nature of the various morally relevant relationships involved. Those relationships are between the combatant and self, society, purpose, comrade, environment, and enemy. However, no attempts have yet been made to fully analyze these relationships and synthesize them in a way that captures the fullness of the combatant's moral reality. Such a synthesis would be a theory of the combatant.

Finally, what would be the utility of such a theory? This brings us back to where we began. Over the past decade, there has been a rapid proliferation of drones, and they are used in an increasingly wider array of combat actions, including targeted assassinations. Contractors are hired in increasing numbers to serve in traditional military roles. International terrorist organizations are spreading. Cyber-warfare is not a misnomer. Humanitarian intervention was sanctioned by the UN over a decade ago. These activities involve a shift in traditional ideas on what it means to be a combatant, and all are current and on-going changes in the international environment. If we want to understand the moral implications of these changes, it is important to know what exactly we are deviating from. And a theory of the combatant would provide exactly that.

## Notes

<sup>1</sup> Department of Justice, "Procedures for Approving Direct Action against Terrorist Targets Located Outside the United States and Areas of Active Hostilities," accessed August 9, 2016. [https://www.justice.gov/eo/foia-library/procedures\\_for\\_approving\\_direct\\_action\\_against\\_terrorist\\_targets/download](https://www.justice.gov/eo/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download).

<sup>2</sup> Micah Zenko, *Policy Innovation No. 31* (Council on Foreign Relations, Center for Preventative Action: 2013), 3, accessed April 16, 2013, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwi747jW36bPAhUI7oMKHSgNC8QQFggjMAA&url=http%3A%2F%2Fi.cfr.org%2Fcontent%2Fpublications%2Fattachments%2FPIM\\_Drones\\_Zenko\\_Final\\_4\\_16\\_13.pdf&usg=AFQjCNHH8Vgh7NHd83T22eIUObR\\_NaYBXA&sig2=Dz7hrUOf6IbO20ykXj0D7w](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwi747jW36bPAhUI7oMKHSgNC8QQFggjMAA&url=http%3A%2F%2Fi.cfr.org%2Fcontent%2Fpublications%2Fattachments%2FPIM_Drones_Zenko_Final_4_16_13.pdf&usg=AFQjCNHH8Vgh7NHd83T22eIUObR_NaYBXA&sig2=Dz7hrUOf6IbO20ykXj0D7w). John Kaag and Sarah Kreps also discuss some efforts to request more transparency from the Obama Administration. See John Kaag and Sarah Kreps, *Drone Warfare*, Kindle ed. (Malden, MA: Polity Press, 2014), 36-40. I use colloquialism "drone" because of its broad use in non-military contexts. This usage is not at all intended to belittle the great effort that goes into executing the demanding mission.

<sup>3</sup> The application of the term *sui generis* in this context comes from Seth Lazar. See Seth Lazar, "Responsibility, Risk, and Killing in Self-Defense\*," *Ethics* 119, no. 4 (July 2009): 700.

<sup>4</sup> The categories I use here are not explicit in throughout the literature, but are adapted from Noam J. Zohar, "Collective War and Individualistic Ethics: Against the Conscripting of 'Self-Defense'," *Political Theory* 21, no. 4 (November 1993). It is possible to categorize based on other features with the arguments, but this organizing principle seems to me to be the best way to capture all of the various arguments and provide a starting place for discussing their nuances.

<sup>5</sup> See Judith J. Thomson, "Self-Defense," *Philosophy & Public Affairs* 20, no. 4 (Autumn 1991).

<sup>6</sup> *Ibid.*, 300.

<sup>7</sup> Yitzhak Benbaji, "A Defense of the Traditional War Convention," *Ethics* 118 (April 2008): 476-7.

<sup>8</sup> *Ibid.*, 481-6.

<sup>9</sup> Michael Otsuka, "Killing the Innocent in Self-Defense," *Philosophy & Public Affairs* 23, no. 1 (Winter 1994): 84-5.

<sup>10</sup> *Ibid.*, 79.

<sup>11</sup> *Ibid.*, 75.

<sup>12</sup> For other views see Yitzhak Benbaji, "Culpable Bystanders, Innocent Threats and the Ethics of Self-Defense," *Canadian Journal of Philosophy* 35, no. 4 (December 2005)., Yitzhak

Benbaji, "The Responsibility of Soldiers and the Ethics of Killing in War," *The Philosophical Quarterly* 57, no. 229 (October 2007)., Helen Frowe, "Equating Innocent Threats and Bystanders," *Journal of Applied Philosophy* 25, no. 4 (2008)., Helen Frowe, "Self-Defence and the Principle of Non-Combatant Immunity," *Journal of Moral Philosophy* 8 (2011)., Jonathan Quong, "Killing in Self-Defense," *Ethics* 119, no. 3 (2009)., and Cheyney C Ryan, "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics* 93, no. 3 (1983).

<sup>13</sup> Paul W. Kahn, "The Paradox of Riskless Warfare," *Philosophy and Public Policy Quarterly* 22, no. 3 (Summer 2002): 2.

<sup>14</sup> See Jeff McMahan, *Killing in War*, *Uehiro Series in Practical Ethics* (New York: Oxford University Press, 2009).

<sup>15</sup> For a review of both sides of the debate see David Rodin and Henry Shue, eds., *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (New York: Oxford University Press, 2008).

<sup>16</sup> For summary of his argument see Jeff McMahan, "Killing in War: Summary," *Analysis Reviews* 71, no. 3 (July 2011).

<sup>17</sup> McMahan, *Killing in War*, 7.

<sup>18</sup> Ibid., 153.

<sup>19</sup> See ibid., 7., and Jeff McMahan, "Can Soldiers Be Expected to Know Whether Their War Is Just?," in *Routledge Handbook of Ethics and War: Just War Theory in the Twenty-First Century*, ed. Fritz Allhoff, Nicholas G. Evans, and Adam Henschke (NY: Routledge, 2013), 21.

<sup>20</sup> See McMahan, *Killing in War*, 190. For other arguments against the consequences of McMahan's moral system see the chapters by Christopher Kutz, Henry Shue, and Judith Lichtenberg in Rodin and Shue.

<sup>21</sup> What distinguishes McMahan from Otsuka and warrants his consideration separately is that McMahan explicitly applies this logic to killing in war, and Otsuka intends his theories of self-defense to apply more broadly. He states in a footnote that he believes cases of killing in war to be of a different variety because of "numbers." He says that the numbers involved in war "tip the balance." Indeed, "numbers may justify the killing of soldiers in wartime even if they are Innocent Aggressors." See Otsuka, 91 (footnote 29).

<sup>22</sup> McMahan, *Killing in War*, 35.

<sup>23</sup> See Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (July 2004): Section VII.

<sup>24</sup> Ibid., 724.

<sup>25</sup> Ibid., 725.

<sup>26</sup> Michael Walzer, "Response to McMahan's Paper," *Philosophia* 34 (August 2006): 44.

<sup>27</sup> See McMahan, *Killing in War*, 153-4., and Jeff McMahan, "The Morality of War and the Law of War," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (New York: Oxford University Press, 2008), 41-3.

<sup>28</sup> McMahan, "The Morality of War and the Law of War," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, 42.

<sup>29</sup> It is even possible to use this statement as the basis for undermining much of his reasoning about the morality of war because it admits a role for collective judgment rather than individual judgment.

<sup>30</sup> Walzer's emphasis is on history as illustration rather than more rigorous moral argumentation. According to an early reviewer, "What makes him vulnerable, however, is that he does not provide us with the foundations of his own position, and thus does not have anything to say as to why we should listen to him rather than to someone whose outlook is fundamentally different." See Hedley Bull, "Review Article: Recapturing the Just War for Political Theory," *World Politics* 31, no. 4 (1979): 598.

<sup>31</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 36.

<sup>32</sup> See Zohar.

<sup>33</sup> Ibid., 617.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid., 618.

<sup>36</sup> Ibid.

<sup>37</sup> See Christopher Kutz, "The Difference Uniforms Make: Collective Violence in Criminal Law and War," *Philosophy & Public Affairs* 33, no. 2 (2005).

<sup>38</sup> See International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, of 8 June 1977 (1977), 261.

<sup>39</sup> Kutz, 176. By "degree of success on the ground" Kutz is referring to the ability of the political entity to manage the affairs of the collective it represents. Kutz's statement is not to be understood as an ends-justify-means perspective in that success in war attributes political legitimacy.

<sup>40</sup> One of the goals of the larger and more detailed study would be to create a narrative description of the combatant that explains his/her justification for killing in war. Highlighting the need for such a narrative is the purpose of this paper.

<sup>41</sup> Ambrose, *On the Duties of the Clergy*, Kindle ed., *The Complete Ante-Nicene & Nicene and Post-Nicene Church Fathers Collection* (The Catholic Way, 2014), Bk. 1, Chap. 36.179.

<sup>42</sup> Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge; New York: Cambridge University Press, 2005), 87.

<sup>43</sup> Kutz.

<sup>44</sup> Christopher Hamner, *Enduring Battle: American Soldiers in Three Wars, 1776-1945* (Lawrence, KS: University of Kansas Press, 2011), 192.

<sup>45</sup> Sebastian Junger, *War*, Kindle ed. (NY: Grand Central Publishing, 2010), 160.

<sup>46</sup> Carl von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret, *On War* (Princeton, N.J.: Princeton University Press, 1976), 119.

<sup>47</sup> Sven Ove Hansson, *The Ethics of Risk: Ethical Analysis in and Uncertain World* (NY: Palgrave Macmillan, 2013), 2.

<sup>48</sup> For a better understanding of the debate about the moral symmetry of combatants in international law, see Rodin and Shue.

<sup>49</sup> One may find similarities between this reasoning and the “paradoxical trinity” of Clausewitz. See Clausewitz, 89.

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